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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion, findings of fact, and conclusions of law of the district court (Appendix A, *infra*, pp. 17–24) are not yet reported.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4. The judgment of the district court (Appendix B, *infra*, p. 25) was entered on July 18, 1960, and the notice of appeal (R. 78) was filed on September 14, 1960. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section

17 of the Act of June 25, 1948, 62 Stat. 989. The following decisions sustain the jurisdiction of this Court to review on direct appeal the order in this case insofar as it failed to adjudicate that appellee had violated the Sherman Act: *United States* v. *National Lead Co.*, 332 U.S. 319; *United States* v. *United States Gypsum Co.*, 340 U.S. 76; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.

STATUTES INVOLVED

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4, provides in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title; * * *

Sections 4 and 5(a) of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 15, 16(a), provide as follows:

> Section 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> Section 5(a). A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such

defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

QUESTION PRESENTED

The Government's complaint in a Sherman Act civil suit requested, *inter alia,* that the district court "adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act." The district court dismissed the complaint at the close of the Government's case, on the ground, among others, that the defendant's actions did not violate the Sherman Act. This Court reversed and remanded, holding that the Government's proof established a prima facie violation of the Sherman Act (362 U.S. 29), and that "[o]n the record before us the Government is entitled to the relief it seeks" (*id.*, at 48). On remand, the defendant submitted no evidence with respect to the substantive violations which this Court had held were established by the record as it then stood, but did introduce evidence designed to show that there was no need for an injunction. The district court entered a judgment which

merely denied the injunctive relief sought by the Government.

The only question presented by this appeal is whether, in these circumstances, the district court erred in refusing to adjudicate that the defendant had violated the Sherman Act.

STATEMENT

The underlying facts involved in this litigation are set out in this Court's opinion in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29. There this Court reversed the dismissal by the district court, after the Government had introduced its evidence, of a civil antitrust suit charging that Parke Davis had participated in a price-fixing conspiracy and combination in violation of Sections 1 and 3 of the Sherman Act. The district court had dismissed the case on the grounds that (1) Parke Davis' actions did not show an illegal price-fixing conspiracy, but merely a permissible refusal to sell to certain customers, and (2) that there was "no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated" (362 U.S. at 47). This Court, holding that the record showed that Parke Davis had gone beyond its right unilaterally to refuse to deal with customers and had "effected arrangements which violated the Sherman Act" (*id.*, at 45), and that the evidence did not support the court's findings as to the impossibility of further violations by Parke Davis (*id.*, at 48), concluded that "[o]n the record before us the Government is entitled to the relief it seeks" (*ibid.*). Ac-

cordingly, it remanded the case "with directions to enter an appropriate judgment enjoining Parke Davis from further violations of the Sherman Act unless the company elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record" (*id.*, at 48–49).

On remand, Parke Davis introduced no evidence to refute the Government's proof of violation; it did introduce evidence designed to show that there was no need for injunctive relief (June Tr. 3–30).[1] The district court ruled on July 5, 1960 that it "adheres to its original decision and finds for the Defendant and against the United States, and denies injunctive relief" (July Tr. 2–3). Pursuant to the court's direction (*ibid.*), Parke Davis then filed proposed supplemental findings and conclusions (R. 84–89) which urged that "[s]ince on the record as a whole the plaintiff is not entitled to the relief it seeks, the complaint must be dismissed" (R. 89). In accordance with the express permission of the Court (July Tr. 3), the Government then submitted objections to the proposed

[1] We refer to the transcript of the hearing on June 6, 1960 as "June Tr.", and the transcript of the hearing on July 5, 1960, as "July Tr."

The evidence Parke Davis introduced to show that injunctive relief was not necessary consisted primarily of the testimony of the Parke Davis vice president in charge of sales that the company had abandoned its price-fixing efforts independently of the Government's suit or investigation; that it had done so as a matter of business judgment, primarily because of their lack of success and the absence of similar efforts by its leading competitors (R. 62; June Tr. 12–13, 18); and that since it "would not be a practical policy", Parke Davis had "made no plans at all to reinstate such a policy" (June Tr. 18).

findings and conclusions (R. 71–77).[2] These objections stated that "[t]he conclusion of law is clear, i.e., that Parke Davis has violated Sections 1 and 3 of the Sherman Act. Consequently, the Government should have a judgment in its favor and injunctive relief should be imposed against Parke Davis" (R. 72). The Government argued further (R. 77) that:

> Defendant's second conclusion of law requests dismissal of the complaint because the Government is not entitled to relief. Defendant ignores the fact that the Supreme Court branded its activities in the District of Columbia and the State of Virginia as violations of Sections 1 and 3 of the Sherman Act. The Government submits that it is entitled to a judgment in its favor, whether or not injunctive relief is granted.

The same view had been expressed in the Government's Reply Memorandum on Relief (R. 26–34), filed prior to the court's decision on July 5, 1960, which stated (R. 34):

> The Government respectfully submits therefore that judgment should be had against

[2] While Government counsel had advised the court of its intention to file these objections after receipt of a copy of defendant's proposed findings, and the court had indicated it would receive them, they were not presented to the court until July 19, 1960. When the Government presented them, it was not aware that the court had mailed its opinion to counsel on the previous evening (see R. 95–96). Later the same day the judge advised Government counsel that he "had carefully considered" the Government's objections, but that "they made absolutely no difference in his mind, and that he did not intend to change his Opinion as a result of them" (*ibid.*).

> Parke, Davis and that the injunctive relief called for by the complaint be granted.

On July 18, 1960, the court entered its opinion, findings and conclusions (Appendix A, *infra,* pp. 17–24), and its order (Appendix B, *infra,* p. 25). The court stated (*infra,* p. 17) that "the present hearing relates solely to the question of injunctive relief," and its opinion and findings dealt solely with that issue. The order, after reciting that the court had "heard the evidence on the issue of relief," had "reviewed the entire record," had considered the briefs and had concluded that, "upon the facts and the law, the Plaintiff is not entitled to the relief it seeks," merely stated:

> ORDERED that the injunctive relief sought by the Plaintiff is denied.

THE QUESTION IS SUBSTANTIAL

In the previous appeal in this case, this Court, after holding that the facts found by the trial court established a violation of Section 1 of the Sherman Act, concluded (362 U.S. 29, 48) that "[o]n the record before us the Government is entitled to the relief it seeks". The relief sought in the Government's complaint included the request that "the Court adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act" (Record, No. 20, Oct. Term, 1959, p. 7). On remand, Parke Davis introduced no evidence on the question of violation. This appeal

presents the question whether, on the same record on which this Court had already held that violation was established, the trial court could refuse to enter an adjudication of violation, as requested in the complaint and as further urged on remand,[3] because it was of the view that "the injunctive relief sought by the Government would be unnecessary and inappropriate" (R. 65).[4]

The question is an important one in the administration of the antitrust laws. The decision below holds in effect that the Government is not entitled to an adjudication of violation, even though such violation is concededly established by the record, solely because the court deems injunctive relief inappropriate. This ruling, if allowed to stand, would not only seriously weaken the efficacy of Section 5(a) of the Clayton Act as an important tool of antitrust enforcement, but would also weaken the effectiveness of the Government's own suit in preventing and re-

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[3] See Statement, *supra*, pp. 6–7. Prior to the trial court's decision not to grant injunctive relief, the Government had urged that "judgment should be had against Parke Davis *and* that the injunctive relief * * * be granted" (R. 34, emphasis added). The same view was repeated in the Government's objections to Parke Davis' proposed findings and conclusions (R. 72), and the Government there also explicitly stated that "it is entitled to a judgment in its favor, whether or not injunctive relief is granted" (R. 77). While the district court had entered its opinion, findings and judgment the day before it received these objections, the court subsequently considered them but declined to change its decision (see note 2, *supra*, p. 6). Thus, the court in effect treated the objections as a request for reconsideration, which it considered and denied.

[4] The Government is not challenging, on this appeal, the trial court's denial of injunctive relief.

straining violations of the antitrust laws. We believe that Congress has imposed on the district court the duty, when the record in a Government antitrust suit establishes a violation of the antitrust laws, to adjudicate that violation, whether or not the court also grants injunctive relief. In the instant case, the duty of the court below to adjudicate violation was particularly clear, since (1) this Court had previously held that the record established violation, (2) Parke Davis introduced no further evidence on violation, and (3) the court below itself recognized that "the present hearing relates solely to the question of injunctive relief" (Appendix A, *infra*, p. 17).

1. Section 5(a) of the Clayton Act, 15 U.S.C. 16(a) (*supra*, pp. 2–3), makes any "final judgment or decree" entered in any civil or criminal antitrust action brought by the United States "to the effect that a defendant has violated said laws" prima facie evidence, in any private antitrust suit against the defendant, that the defendant had committed the violation thus adjudged.[5] This provision "reflect[s] a purpose to minimize the burdens of litigation for injured private suitors by making available to them *all matters previously established* by the Government in antitrust actions". *Emich Motors* v. *General Motors*, 340 U.S. 558, 568 (emphasis added); see *Radovich* v. *National Football League*, 352 U.S. 445, 454. It was added to the law in 1914 because of recognition that, due to the

[5] This provision is explicitly made not applicable to consent judgments entered before any testimony has been taken, and to decrees in suits for damages brought by the United States under 15 U.S.C. 15a.

difficult problems of proof in antitrust cases, the mere grant of the right to sue for treble damages did not adequately protect the rights of persons who had been injured by violations of the antitrust laws. See, *e.g.*, *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 63. It stemmed from a request by President Wilson to give "private individuals who claim to have been injured * * * the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has * * * sued the combinations complained of and won its suit * * *. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience." 51 Cong. Rec. 1964.

Section 5(a) of the Clayton Act was thus designed to make more effective the enforcement scheme of the Sherman Act. See, also, H. Rep. No. 627, 63d Cong., 2d Sess. 14; S. Rep. No. 698, 63d Cong., 2d Sess. 45; 51 Cong. Rec. 9270, 9490, 13851. Since its enactment in 1890, the Sherman Act has provided not only for civil and criminal suits by the Government, but also for damage and injunction suits by injured private parties. The latter suit is an important element of effective antitrust enforcement. "It is clear Congress intended to use private self-interest as a means of enforcement * * * when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee." *Bruce's Juices* v. *American Can Company*, 330 U.S. 743, 751–752. See *Wilder Mfg. Co. v. Corn Prod-*

ucts Co., 236 U.S. 165, 174; *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp 167, 171 (S.D.N.Y.).

The decision below, however, would seriously weaken the Congressional plan of making the private suit an important part of antitrust enforcement. For despite the clear Congressional "purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors v. General Motors, supra*), a private suitor would have that benefit only if the trial court held that injunctive relief was necessary. Thus, no matter how lengthy the trial, how complex the issues, and how extensive and clear the Government's proof of violation may be, a private plaintiff who has suffered great injury from these proven violations would have to relitigate the question of violation in his own case. Placing such an unwarranted burden on the private party would inevitably weaken the effectiveness of the private damage action, and would thus thwart the Congressional policy to facilitate redress through such suits. It would also impose on the courts the unnecessary burden of relitigating issues that had already been fully canvassed in the prior government suit.

2. An adjudication of violation by the trial court is not limited in its effect to private actions; it also affects government litigation. In the first place, since 1955 (see 69 Stat. 283) the Government has been authorized to maintain its own antitrust suit for damages

(15 U.S.C. 15a), and in such suit it can rely upon the judgment in its prior equity or criminal action as prima facie evidence of the violations there established (15 U.S.C. 16(a)). Moreover, an adjudication of violation here would have a direct impact upon the instant case. The trial court, despite the clear proof of violation, has denied injunctive relief because of its conclusion (Appendix A, *infra*, p. 24) that there is no "reasonable probability or likelihood" that Parke Davis will resume its illegal price-fixing attempts. However, the court refused to dismiss the complaint, as Parke Davis had urged; by merely denying the Government injunctive relief, it retained jurisdiction. If, at some future date, Parke Davis should again resume its illegal activities (either in the area involved in this case or elsewhere),* the Government would be entitled to have the benefit of an adjudication of violation, and should not be required to try the prior case all over again. Yet that may well be the effect of the court's failure to enter the adjudication of violation that the Government requested and the proof established.

There is another adverse consequence to the public if a trial court may, despite uncontradicted evidence of violation, refuse an adjudication merely because it declines to grant injunctive relief. One of the major

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* As the district court found (Appendix A, *infra*, p. 23), Parke Davis has never made any announcement to the public or to the drug trade of its asserted abandonment of its policy of attempting to maintain "fair trade" prices in non-"fair trade" areas.

factors that impel antitrust defendants to enter into consent judgments before trial is the knowledge that, if they go to trial and lose, the adjudication of violation will be available to treble damage plaintiffs. A large number of antitrust cases are settled by consent, at great saving to the Government and benefit to the public. Defendants, however, would have less inducement to enter into consent judgments if they knew that, even though they were held after trial to have violated the law, they might avoid an adjudication to that effect if the trial court was persuaded that injunctive relief was unnecessary because the violations had "ceased".

3. The power and duty of the district court to enter an adjudication of violation, where the proof at the trial establishes violation, is not dependent upon the granting of injunctive or other equitable relief. The district court's comprehensive jurisdiction and duty under Section 4 of the Sherman Act, 15 U.S.C. 4 (*supra*, p. 2) to "prevent and restrain" violations of the antitrust laws empowers and obligates it to adjudicate violation. See also 28 U.S.C. 2201. Moreover, Section 5a of the Clayton Act contemplates that judgments in Government antitrust cases will contain an adjudication "to the effect that a defendant has violated said laws." And, as we have shown, to limit the Government's right to an adjudication to cases where injunctive relief is also granted would impair the basic Congressional scheme of antitrust enforcement.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632, this Court stated that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case; *i.e.*, does not make the case moot * * *. A controversy may remain to be settled in such circumstances * * *, *e.g.*, a dispute over the legality of the challenged practices." It went on to add that this "public interest in having the legality of practices settled, militates against a mootness conclusion" entitling the defendant to a dismissal, and that "[t]he courts have rightly refused to grant defendants such a powerful weapon against public law enforcement" (*ibid.*). See *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309–310. If the need for resolution of the "legality of the challenged practices" may thus survive their abandonment, it would seem *a fortiori* that, where their illegality has already been established on the record, the need for an adjudication thereof similarly survives abandonment.[1]

[1] The only judicial authority that we have found supports our position. In *United States* v. *Railway Employés' Dept., A.F.L.*, 286 Fed. 228 (N.D. Ill.), the court denied a motion to dismiss a Government civil antitrust suit on the ground that the "conspiracy charged in the bill has disappeared" and the strike had been settled on many of the railroads (p. 231). The court held that, in the light of Section 5(a) of the Clayton Act, the consequences of an adjudication of violation dictated against dismissing the action (pp. 232, 233). Cf. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452.

CONCLUSION

The question presented by this appeal is substantial and of large public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1960.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

(Filed July 18, 1960, Harry M. Hull, Clerk)

OPINION

The above entitled matter came on for hearing, pursuant to a mandate of the Supreme Court of the United States, wherein the judgment of this Court, 164 Fed. Supp. 827, was reversed and the case remanded to this Court with directions to enter an appropriate judgment enjoining the defendant from further violations of the Sherman Act "unless the defendant elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record." 362 U.S. 29, 4 L. ed. 2d 505.

The defendant elected to submit evidence in accordance with the opinion above set out and the present hearing relates solely to the question of injunctive relief. The only witness appearing at the present hearing was the Vice President and Director of the U.S. Sales and Promotion of defendant. He had occupied that position since 1951 and had been connected with the sale of defendant's products for over

twenty-seven years. He testified that he is responsible for the carrying out of the sales policies of the defendant by reason of his office.

Clearly the witness was intimately qualified to testify concerning the probability of a resumption of prior sales practices.

His uncontradicted testimony showed the futility of those practices for the reason that a refusal by one wholesaler to sell defendant's goods to a retailer would be nullified by the fact that the products sought could be obtained from a different wholesale establishment and consequently could be sold at discount. Because of the ineffectiveness of the prior sales practice they were for sound business reasons abandoned. Thus it appears to be in the interest of good business to have terminated the sales practices of four years ago.

It also appears that due to competition with others in the same kind of business it was necessary for the defendant to meet that competition. Since highly reputable firms such as Lilly, Sharp & Dohme, Abbott, Upjohn and Squibb permitted competing products to be sold at a discount, it appears to the Court that it would have been poor business indeed not to have done as defendant acted in putting a permanent stop to the former sales practices.

The Government admits that since the time of abandonment defendant, up to the present time, has made no attempt to prevent selling its products at discount prices. Advertisements in newspapers appearing throughout that time are in evidence and demonstrate that retailers throughout the area pertinent here have been continuously selling products of the defendant at heavy discount much below the suggested minimum retail prices.

The Court has in mind that the witness here, although he may have heard of the investigation by the

Government into sales practices of defendant and had received an opinion from Company counsel that such investigation was proper, it does not necessarily follow that business methods employed in good faith should of necessity be then and there abandoned.

The witness finally states that the defendant had been compelled to stop its former sales policy sometime prior to the filing of the complaint herein. The testimony is borne out by the record.

It seems clear to the Court as a further reason for establishing the fact that the real cause for the change in business policy was based on sound mercantile common sense is that the former practice was not resumed by defendant after it had been held in the fall of 1957 in a decision by Judge Tamm of this Court in a companion suit on the criminal side that the charges resulting from the antitrust investigation were without merit.

In view of the entire record of this case it appears clear to the Court that to agree with the contentions of the Government, the Court's decision would of necessity have to be based on a finding that the defendant was and is dishonest and that despite the holding of the Supreme Court of the United States it is likely to again indulge in practices held to be unlawful and is therefore a potential law breaker.

The Court declines to so brand the defendant corporation. To do so would in effect taint the defendant with the stigma of its officers being bereft of ordinary business sense.

It is not, in the Court's opinion, the investigation by the Government that prompted the change in business policy of sales. The change was effective prior to the to the filing of the complaint herein and the Court finds nothing in the record that can properly indicate

the change was made by anything other than the market conditions that obtained and the exercise of ordinary good judgment.

FINDINGS OF FACT

The defendant having offered evidence relating solely to the issue of the propriety of injunctive relief on June 6, 1960, and the plaintiff having presented no further evidence, the Court makes the following Findings of Fact and Conclusions of Law in accordance with its oral opinion of July 5, 1960. These Findings supplement those entered by the Court on July 16, 1958. (164 Fed. Supp. 827.)

1. Prior to July 1956, the defendant Parke, Davis, in order to promote the sale of its products in non-Fair Trade areas, had sought to encourage the retail sale of its products in such areas at prices not less than the minimum retail prices suggested in Parke, Davis' catalog. In the summer of 1956 in Washington, D.C., and Virginia, Parke, Davis was confronted with a price-cutting situation such as the company had never encountered before. (Tr. 10). In response to that situation, as more fully described in the Court's Findings of July 16, 1958, Parke, Davis in July and August 1956, engaged in activity whose purpose was to discourage certain retail drugstores in Washington, D.C., and Virginia from selling and advertising Parke, Davis products at less than the suggested minimum retail prices. This activity, whose legality has been challenged in this action, was undertaken pursuant to a then existing Parke, Davis sales policy under which Parke, Davis would refuse to sell its products in a non-Fair Trade area (a) to a retail drugstore which was selling Parke, Davis products at less than the suggested minimum retail prices, and (b) to any wholesale distributor which was supplying such a

retail drugstore with Parke, Davis products. (Findings of July 16, 1958; Tr. 8–10).

2. Prior to July 1956, Parke, Davis' sales officials consulted counsel as to the legality of the foregoing sales policy and were advised that the policy was lawful. At the time the challenged price maintenance activity occurred, the responsible Parke, Davis officials, relying upon the foregoing advice of counsel, believed the activity to be lawful. (Tr. 7–18; GX 16).

3. In the fall of 1956 Parke, Davis officials came to the conclusion, on the basis of practical experience in Washington, D.C., Virginia and elsewhere, that the sales policy and activity undertaken pursuant thereto did not, and would not in the future, effectively discourage the retail sale and advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 12–13.) In the same period Parke, Davis' sales officials were advised that Parke, Davis' leading competitors were making no effort to discourage retail sales of their products at less than their suggested minimum retail prices in non-Fair Trade areas, and it thus became apparent to Parke, Davis that its sales policy, if pursued, would not only fail to accomplish its purpose but would actually subject Parke, Davis products to a competitive disadvantage. (Tr. 12–13, 18).

4. In the summer and fall of 1956 the Parke, Davis officials responsible for framing Parke, Davis' sales policies held a series of conferences at which they reviewed the consideration set forth in Paragraph 3 above. (Tr. 11–12). In January 1957, in response to these considerations, the Parke, Davis officials decided that the sales policy described above should be abandoned at once and that Parke, Davis should in the future take no action to discourage the retail sale or advertisement of Parke, Davis products at less

than suggested minimum retail prices in non-Fair Trade areas. (Tr. 12–13).

5. The considerations in favor of the abandonment of the sales policy were discussed with Parke, Davis' field personnel in December 1956. In January 1957, Parke, Davis' field personnel in non-Fair Trade areas were instructed to make no further effort to discourage retail sale of Parke, Davis products at less than suggested minimum retail prices in such areas, and these instructions have remained in effect ever since. (Tr. 12–14, 15).

6. The decision and the instructions described in paragraphs 4 and 5 above were made and given more than three months before any legal action was instituted by the plaintiff with respect to the challenged price maintenance activity. Parke, Davis' Vice President and Director of United States Sales, who was responsible for the change in policy, testified that the decision to abandon the prior sales policy and activity pursuant thereto was not prompted by the fact that the plaintiff had instituted an investigation of the challenged price maintenance activity. (Tr. 15–16).

7. At no time since January 1957, either before or after the decisions of this Court in companion Criminal Action No. 444–57 and this case, has Parke, Davis considered or taken any action to reestablish the sales policy hereinbefore described or to discourage, by refusals to sell or otherwise, the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 14–15, 16–17).

8. Since January 1957, Parke, Davis has regularly and continuously made sales in non-Fair Trade areas, including Washington, D.C., and Virginia, (a) to retail drugstores which were and are selling and advertising Parke, Davis products at less than suggested

minimum retail prices, and (b) to wholesale distributors who were and are selling Parke, Davis products to such retail drugstores.

9. Since January 1957, retail drugstores in Washington, D.C., and Virginia have regularly and continuously advertised Parke, Davis products for sale at less than Parke, Davis' suggested minimum retail prices and made sales according to the terms of such advertisement. (DX 1, 2, 3).

10. Parke, Davis at this time has no intention of re-establishing the sales policy hereinbefore described or of taking any action, by refusals to sell, to discourage the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 18).

11. In view of the ineffectiveness, competitive disadvantages, and abandonment of the prior sales policy, which was intended, but failed, to promote the sales of Parke, Davis products in non-Fair Trade areas, Parke, Davis is currently attempting to develop new methods of promoting such sales. The new promotion methods under development are based upon the assumption that Parke, Davis products will continue to be sold and advertised at less than suggested minimum retail prices in non-Fair Trade areas in the future. (Tr. 19).

12. Parke, Davis' sales to the drug firms (retail and wholesale) who were affected by the challenged price maintenance activity, which activity lasted for only two months (July and August 1956), constituted substantially less than 2% of Parke, Davis' total sales in 1956 and subsequent years. (Tr. 19–20).

13. Neither the adoption of the prior sales policy before July 1956, nor its abandonment in January 1957, was the subject of any express public announcement by Parke, Davis. (Tr. 25, 27). However, the

regular and continuous retail sale and advertisement of Parke, Davis products at less than suggested minimum retail prices in Washington, D.C., and Virginia since January 1957, has in effect served as a public announcement that Parke, Davis' products may be sold and advertised without interference by Parke, Davis. (DX 1, 2, 3).

14. The evidence as a whole and the particular facts found in Paragraphs 1–13 above demonstrate that there is now no dangerous probability, or even any reasonable probability or likelihood, that the prior sales policy, the challenged price maintenance activity, or any other activity pursuant to the policy, will in the future be resumed or undertaken by the defendant in Washington, D.C., Virginia or elsewhere.

CONCLUSIONS OF LAW

1. Since on the record as a whole the plaintiff is not entitled to the relief it seeks, and

2. In view of the Supplementary Findings of Fact and under settled principles of equity, the injunctive relief sought by the plaintiff would be unnecessary and inappropriate, it is therefore denied.

/s/ JOSEPH R. JACKSON,
Judge.

JULY 18, 1960.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

ORDER

The Court having heard the evidence on the issue of relief, and the Court having reviewed the entire record, considered the briefs of the parties and concluded that, upon the facts and the law, the Plaintiff is not entitled to the relief it seeks, it is

ORDERED that the injunctive relief sought by the Plaintiff is denied.

/s/ JOSEPH R. JACKSON,
Judge.

[Filed July 18, 1960.]

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JAMES R. BROWNING, Clerk

No. 320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Appellant*

v.

PACKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 526

UNITED STATES OF AMERICA, *Appellant*

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

Appellee respectfully moves that the Court dismiss the instant appeal upon the grounds that the sole question raised in Appellant's Jurisdictional Statement was not pressed or passed upon below and that the unchallenged findings of fact of the court below establish that the case upon the merits is moot. In the alternative Appellee moves that the Court affirm the order of the court below upon the ground that the question presented in the Jurisdictional Statement is so unsubstantial as to make further argument to this Court unnecessary.

OPINION BELOW

The opinion, findings of fact, and conclusions of law of the court below are not yet reported but are printed in Appendix A of the Jurisdictional Statement.

JURISDICTION

Appellant invokes the jurisdiction of this Court under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, but jurisdiction under this statute is challenged by the instant motion.

STATUTE INVOLVED

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 4, provides in pertinent part as follows:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute *proceedings in equity* to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. . . ." (Emphasis supplied.)

QUESTIONS PRESENTED

Should this Court take jurisdiction of an appeal where in the proceedings below Appellant failed properly to raise, and did not obtain a decision on, the only point presented on appeal, and the District Court made unchallenged findings of fact which render the case moot under prior holdings of this Court?

Is a substantial question presented to this Court by the contention that the District Court should have entered a judgment for the plaintiff on its prima facie case, when the record below conclusively establishes that defendant, foregoing any proof on the merits, successfully interposed the recognized equitable defense that injunctive relief was unnecessary and should not be granted?

STATEMENT

1. Prior Proceedings

On May 2, 1957, the Government filed a standard civil antitrust complaint against Parke, Davis in the United States District Court for the District of Columbia. The complaint stated that it was filed under Section 4 of the Sherman Act "in order to prevent and restrain the continuing violations by the defendant, as hereinafter alleged, of Sections 1 and 3 of the Sherman Act." The first paragraph of the multi-paragraph prayer for relief made the customary request that the District Court "adjudge and decree" that the defendant had violated the Sherman Act, and the next four paragraphs specified the various injunctions being sought against Parke, Davis.

At the trial the Government introduced evidence to show that in July and August of 1956 Parke, Davis had certain dealings with a handful of drug whole-

salers and retailers located primarily in the metropolitan area of Washington, D. C. At the close of the Government's case, and without hearing Parke, Davis in defense, the District Court dismissed the complaint upon the ground, among others, that the Government had failed to prove a violation of the antitrust laws.

On appeal to this Court it was held that the Government's evidence did constitute a prima facie case of antitrust violation. 362 U.S. 29. This Court remanded the case to the District Court "with directions to enter an appropriate judgment *enjoining* Parke Davis from further violations of the Sherman Act *unless* the company elects to submit evidence in defense and refutes the Government's right to *injunctive relief* established by the record." 362 U.S. at 48-9 (emphasis supplied).

2. Proceedings Below

Pursuant to this direction and following a conference with counsel the court set the case for further trial on June 6, 1960.

On June 3, 1960, the Government submitted to the court a document entitled "Supplemental Trial Memorandum" (R. 17-25).[1] This memorandum stated that "the only issue now before the Court" is whether or not an injunction in some form should issue against Parke, Davis (R. 17). For nine pages the memo-

[1] Several of the briefs involved in the proceedings below, including the brief described in the text above, were delivered directly to the judge without at that time being formally "filed" (and stamped as such) in the clerk's office. The documents were subsequently sent to the clerk's office and stamped "Filed" on a date considerably later than that of their original delivery.

randum argued that an injunction should issue, and its "Conclusion" then stated as follows:

> "The Government respectfully submits that this Court should enter a decree enjoining the defendants from further price fixing as requested by the Government in its complaint." (R. 25).

This memorandum, which undertook to define the issues before the District Court in terms of injunctive relief alone, was the only paper filed with the court subsequent to the remand and prior to the reopening of the trial. It said nothing whatever about any other or further relief and contained no suggestion that the Government was seeking or entitled to a judgment apart from injunctive relief.

When Parke, Davis opened its case on June 6, 1960, it presented testimony and documentary proof directed solely to the proposition that injunctive relief in the premises would not be appropriate (June Tr. 3-30).[1] At the close of its evidence on the same day Parke, Davis submitted to the court a document entitled "Defendant's Trial Memorandum on Relief" (June Tr. 31; R. 35-60). This 22-page memorandum was devoted entirely to an analysis of the authorities on the question of the propriety of injunctive relief (R. 35-60). As of this time neither party, on brief or otherwise, had discussed a separate judgment on the merits.

Shortly after the hearing two additional papers were filed by the parties. About June 13, 1960 the Government filed a "reply memorandum on relief" (R. 26-34), and on June 17 Parke, Davis filed a similar docu-

[1] References in this motion (as in the Jurisdictional Statement) to "June Tr." and "July Tr." are to the transcripts of the proceedings of June 6 and July 5, 1960, respectively.

ment (R. 1-15). Both briefs contained lengthy arguments on the question of injunctive relief, but again neither argued the question of a separate judgment.[1]

On July 5, 1960, the District Court announced in open court that it had decided to deny injunctive relief and asked that the parties submit findings of fact and conclusions of law (July Tr. 2-3). Parke, Davis complied with the court's request; on July 11 it submitted "Defendant's Proposed Supplementary Findings of Fact and Conclusions of Law on the Issue of Relief" (R. 84-89). Naturally the document related solely to the issue of injunctive relief and asked that the complaint be dismissed (R. 89).

The Government, on the other hand, submitted no papers of any kind for the court's consideration prior to the opinion and order of the court. At no time did the Government ever submit to the court any proposed form of judgment or decree.

On July 18, 1960, the District Court handed down its opinion and order (R. 66-70). In the opinion the court explicitly stated that the sole issue which it was deciding was "the question of injunctive relief" (App. A, p. 17).[2] It squarely held that an injunction

[1] Only in the final sentence of each brief is there any reference to a judgment. The Government's final sentence, after nine pages of argument on injunctive relief, suggests "that judgment should be had against Parke, Davis and that the injunctive relief called for by the complaint be granted." (R. 34). The defendant's memorandum, after 13 pages of argument on injunctive relief, states in the final sentence that "the Court should withhold the drastic remedy sought by the Government and dismiss the complaint." (R. 15).

[2] References in this motion to "App. A" and "App. B" are to the respective appendices printed with Appellant's Jurisdictional Statement.

should not issue. It also made detailed findings of fact, including a finding of the ultimate fact "that there is now no dangerous probability, or even any reasonable probability or likelihood" that the conduct in which Parke, Davis had briefly engaged in the summer of 1956 would be repeated, either in the metropolitan area of Washington, D. C. or elsewhere (App. A, p. 24).

The District Court also reached two conclusions of law. They read in their entirety as follows:

> "1. Since on the record as a whole the plaintiff is not entitled to the relief it seeks, and
>
> "2. In view of the Supplementary Findings of Fact and under settled principles of equity, the injunctive relief sought by the plaintiff would be unnecessary and inappropriate, it is therefore denied." (App. A, p. 24).

At the same time the court entered the following order:

> "ORDER
>
> "The Court having heard the evidence on the issue of relief, and the Court having reviewed the entire record, considered the briefs of the parties and concluded that, upon the facts and the law, the Plaintiff is not entitled to the relief it seeks, it is
>
> "ORDERED that the injunctive relief sought by the Plaintiff is denied." (App. B).

Nowhere in the Opinion, the Findings of Fact, the Conclusions of Law, or the Order is there any reference to the question of the entry of a judgment on the merits, either in the form of a dismissal of the complaint or otherwise.

On this appeal the Government does not challenge any of the affirmative actions taken by the District

Court. It does not challenge the court's finding that there was no "reasonable probability or likelihood" that the defendant would violate the antitrust laws in the future; it does not challenge the court's conclusion of law that injunctive relief would be inappropriate; and it does not challenge the order's denial of that relief. On this appeal, therefore, the foregoing findings and rulings are accepted as true and correct.

On July 19, 1960, the day after the court had rendered its decision, the Government apparently delivered to the District Court a paper entitled "Government's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law" (R. 71-77, 95-96). The document was not and has not been served upon Parke, Davis or its counsel. Indeed Parke, Davis did not even become aware of its existence until after this appeal had been commenced (R. 91). Yet this is the document upon which the Government primarily relies in claiming here that the allegedly substantial question of law presented to this Court was presented below (Jurisdictional Statement, pp. 6, 8, note 3).

As its title indicates, this paper was an answer to Parke, Davis' proposed findings and conclusions on injunctive relief; its seven-page discussion focused entirely on that issue, which the paper itself described as "the sole issue" before the court (R. 71). The last sentence on the last page stated, "The Government submits that it is entitled to a judgment in its favor, whether or not injunctive relief is granted." (R. 77). This was the only point in these extended proceedings at which the Government, by referring to a judgment separately from an injunction, even approached the point of raising the question of law presented on this appeal.

Parke, Davis was neither aware of nor a party to any of the communications between the Government and the District Court after July 18, 1960 (R. 91, 95-96). Neither the untimely "Objections" of July 19, 1960, nor the other *ex parte* communications (R. 95-96) are properly included in and evidenced by the record on this appeal. Under these circumstances it is difficult to see how the Government can now assert that its statements to the court after July 18 constituted a "request for reconsideration" which properly raised below the question of law which this Court is asked to review (Jurisdictional Statement, p. 8, note 3).

After July 19, 1960, the Government took no further action in the District Court. It did not seek a rehearing. It did not file a motion for the entry of a judgment in its favor, either by a motion to amend the order of July 18, 1960, or otherwise. See Federal Rules of Civil Procedure 59(e). It simply filed a notice of appeal to this Court.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED

1. SINCE THE QUESTION NOW RAISED BY THE GOVERNMENT WAS NEITHER PRESSED NOR PASSED UPON BELOW, IT CANNOT PROPERLY BE BROUGHT BEFORE THIS COURT NOW.

An examination of the record shows a basic weakness in the Government's position on this appeal. The simple facts are that the parties and the court below addressed themselves solely to an issue which is not raised here, and that they did not deal below with the only question which the Government now asks this Court to review.

As the Statement above clearly shows (pp. 4-9, *supra*), after the remand of this case the parties con-

centrated exclusively upon the issue of injunctive relief throughout the proceedings below. Not one word was said about the allegedly "important" question of law which arises, according to the Government, under Section 5 of the Clayton Act of 1914 (15 U.S.C. § 16). Although the Government made two or three cryptic references to a judgment in its favor, the words were all but completely buried in the arguments on the injunctive issue, and when the District Court rendered its decision, it expressly stated that the latter issue was the only question which it was deciding.

This appeal, therefore, does violence to a well established principle of this Court. As the Court said in *Duignan* v. *United States*, 274 U.S. 195, 200,

> "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."

Accord, *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 225; *Lawn* v. *United States*, 355 U.S. 339, 362. Since there is present here none of the exceptional circumstances which are required to justify a departure from this fundamental rule (*e.g.*, that the court below lacked jurisdiction over the action), the rule by itself calls for a dismissal of the appeal.

2. THE DISTRICT COURT'S UNCHALLENGED FINDING THAT THERE IS NO "REASONABLE PROBABILITY OR LIKELIHOOD" OF FUTURE ILLEGALITY HAS RENDERED THE CASE MOOT AND THIS APPEAL UNTENABLE.

Under the terms of the statute invoked by the Government in bringing this suit, this is a "proceeding in

equity"[1] in which the judicial powers of disposition are only "those traditionally exercised by courts of equity." *DeBeers Mines* v. *United States*, 325 U.S. 212, 218-19; *accord*, *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 377. Accordingly, the only legitimate judicial objective in a suit of this kind is that of preventing the defendant from violating the antitrust laws in the future; a suit for an injunction may not be employed "to punish past violations or to simply establish that violations had occurred."[2] It is with these considerations in mind that this Court has long adhered to the principle that a suit in equity becomes "moot" on the merits "if the defendant can demonstrate that 'there is *no reasonable expectation* that the wrong will be repeated.'" *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (quoting the test of mootness laid down by Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945)) (emphasis supplied).[3]

[1] The complaint, whose stated purpose was "to prevent and restrain" future violations of the Sherman Act, was expressly brought under Section 4 of the Sherman Act (15 U.S.C. § 4), which authorizes only "proceedings in equity to prevent and restrain" violations of the Act.

[2] Walling v. Shenandoah-Dives Mining Co., 134 F. 2d 395, 397 (10th Cir. 1943); *cf.*, Hecht Co. v. Bowles, 321 U.S. 321; Mitchell v. Bland, 241 F. 2d 808 (5th Cir. 1957); Mitchell v. Chambers Construction Co., 214 F. 2d 515 (10th Cir. 1954); Walling v. T. Buettner & Co., 133 F. 2d 306 (7th Cir. 1943), *cert. denied*, 319 U.S. 771.

[3] Parke, Davis does not contend that a determination that injunctive relief should not be granted is equivalent to a determination of mootness. In many cases, including the *Grant* case, *supra*, Federal courts have held that the question on the merits was not moot, even though the evidence showed that injunctive relief was inappropriate in the circumstances. The distinction, obviously, is a matter of degree, but the language of the cases has provided

Parke, Davis has squarely met this test. Its evidence, documentary and testimonial, led the court below to the specific finding that there is now *no "reasonable probability or likelihood"* that the conduct of Parke, Davis in 1956 will be repeated (Finding of Fact 14; App. A, p. 24), and the Government has now acquiesced in this finding. By this Court's test, therefore, the case on the merits is moot, the Court is without jurisdiction to hear the appeal, and the appeal must be dismissed.[1]

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a reasonably practical test: if the evidence shows *some* "reasonable expectation" that the defendant will violate the law in the future but does not show that "dangerous probability" or "cognizable danger" of future illegality which would justify injunctive relief, the case is not moot but an injunction will not issue. *United States* v. *W. T. Grant Co., supra.* On the other hand, if there is "*no* reasonable expectation" of future illegality, the case is moot and the court will neither issue an injunction nor consider the merits. See *United States* v. *W. T. Grant Co., supra; accord*, Murphy v. Benson, 270 F. 2d 419 (2d Cir. 1959); United States v. Logan Co., 147 F. Supp. 330 (W.D. Pa. 1957); United States v. Insurance Board of Cleveland, 144 F. Supp. 684, 691-95 (N.D. Ohio 1956).

[1] The Government's demand in this Court for a judgment declaring the fact of violation, even though injunctive relief is admittedly inappropriate, constitutes in effect a demand for a declaratory judgment. But in actions for declaratory judgments the Federal courts have applied substantially the same test of mootness as has been applied in equity proceedings for injunctive relief. See Papaliolios v. Durning, 175 F. 2d 73, 75 (2d Cir. 1949); Clark v. Flory, 237 F. 2d 597 (4th Cir. 1956), *affirming per curiam*, 141 F. Supp. 248 (E.D.S.C. 1956); Tonkins v. City of Greensboro, 162 F. Supp. 549 (M.D.N.C. 1958), *modified*, 175 F. Supp. 476 (M.D.N.C. 1959), *aff'd per curiam*, 276 F. 2d 890 (4th Cir. 1960); *cf.*, Taylor v. McElroy, 360 U.S. 709.

II. SINCE THE QUESTION PRESENTED HERE IS SO UNSUBSTANTIAL AS TO MAKE FURTHER ARGUMENT UNNECESSARY, THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Consistent with the principle that an equity proceeding for an injunction may not be employed "to simply establish that violations had occurred" in the past (see page 11, *supra*), the traditional equity rule is that if the defendant in such a proceeding demonstrates that injunctive relief would be inappropriate, he has in effect made out a complete defense. Even though the plaintiff may have established a prima facie case of past violation, the courts have consistently entered a judgment for the defendant[1] or an order dismissing the complaint[2] where the defendant, without meeting the prima facie case, establishes that there is no basis for injunctive relief. The principle is as applicable in a suit under Section 4 of the Sherman Act as it is in any other proceeding in equity.[3] Until now,

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[1] Mitchell v. Empire Gas Engineering Co., 256 F. 2d 781 (5th Cir. 1958); Mitchell v. Bowers, 157 F. Supp. 344 (W.D.S.C. 1958); Tilbury v. Rogers, 123 F. Supp. 109 (W.D. La. 1954) (entering judgment for the defendant in No. 4040), *aff'd per curiam sub nom.* Tilbury v. Mitchell, 220 F. 2d 757 (5th Cir. 1955), *cert. denied*, 350 U.S. 839; *cf.*, United States v. National City Lines, 134 F. Supp. 350 (N.D. Ill. 1955); Walling v. Nashville C. & St. L. R. Co., 330 U.S. 158.

[2] United States v. United States Steel Corp., 251 U.S. 417, 445; Walling v. T. Buettner & Co., 133 F. 2d 306 (7th Cir. 1943), *cert. denied*, 319 U.S. 771; Fleming v. National Bank of Commerce, 41 F. Supp. 833 (S.D. W. Va. 1941); *cf.* Walling v. Hardwood Co., 325 U.S. 419; Stokely-Van Camp, Inc. v. Federal Trade Commission, 246 F. 2d 458 (7th Cir. 1957). See also, Hecht Co. v. Bowles, 321 U.S. 321.

[3] See United States v. United States Steel Corp., *supra*; *cf.* Standard Oil Co. v. United States, 283 U.S. 163, 181-82. Compare Appalachian Coals, Inc. v. United States, 288 U.S. 344, 377; DeBeers Mines v. United States, 325 U.S. 212, 218-19.

therefore, an antitrust defendant has always been entitled to assume that if he could produce evidence to show that injunctive relief would be inappropriate, there would be no need whatever to go to the trouble and expense of putting in a defense on the merits with a corresponding burden upon the court.

In this proceeding, however, the Government has now come forward with an admittedly novel theory which squarely conflicts not only with the traditional equity practice but also with principles of sensible judicial administration which were incorporated into the law when the Congress enacted the Sherman and Clayton Acts in 1890 and 1914. The Government's argument is that in an equity proceeding under those statutes, after a prima facie showing of past antitrust violations, the plaintiff has a positive statutory right to a declaratory judgment against the defendant, no matter how obvious it may be that the intervention of a court of equity is in no way required. The alleged justification for this proposal is that a declaratory judgment entered by a court of equity might conceivably benefit potential treble damage plaintiffs who are not before the court, who may not exist at all, and who, if they do exist, may never seek to assert their claims.

Quite apart from the fact that in the past forty-six years no court has ever recognized its affirmative statutory "duty" as now hypothesized by the Government—and setting aside the fact that similar arguments have been rejected in the past[1]—the logical implications of

[1] In United States v. W. T. Grant Co., 345 U.S. 629, upon which the Government here relies, the District Court in the proceedings below (112 F. Supp. 336 (S.D.N.Y. 1952)) recognized the possi-

the argument are enough to defeat it. Consider, for example, the situation in this case. Parke, Davis, relying on the established rules, successfully interposed the standard equitable defense that there was no basis for injunctive relief in the circumstances. Because the merits of the antitrust questions were not relevant to that defense and required no discussion at the trial of June 6, 1960, Parke, Davis was able to present its case in a very brief time with a minimal burden for the parties and the court. If the rule proposed by the Government is accepted, however, no defendant in a suit under Section 4 of the Sherman Act will ever again be able to follow this economical and sensible course. Under the Government's theory every such defendant must either accept an adverse declaratory judgment, with consequent treble damage exposure under Section 5 of the Clayton Act, or put in a complete defense on the merits, even though the case may admittedly be one in which a court of equity should not intervene at all.

The implication of these arguments is that the Congress considered the interests of treble damage plaintiffs to be of such overriding importance that the parties and the court in a Government civil antitrust suit should be required to litigate the antitrust issues through to their ultimate conclusion, whether or not such time-consuming litigation would serve the inter-

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bility that the defendants had violated the anti-trust laws in the past, but the defendants demonstrated that the challenged arrangements had been terminated. Despite the latter showing the Government insisted that it was "entitled to a decree that the defendants have violated" the law. 112 F. Supp. at 337-38. The District Court held, however, that the defendants were entitled either to a dismissal of the complaint or to a judgment in their favor. Judgment was entered for the defendants, and this Court affirmed.

ests of the parties to the Government suit itself. This is clearly not what the Congress intended. For example, Section 5 of the Clayton Act, the Government's own touchstone, itself provides in effect that if the Government and the defendant can avoid litigation of the antitrust issues by settling the issues through a consent decree, they may do so, even though such a decree will deprive theoretical treble damage plaintiffs of the advantages of a litigated judgment of the kind for which the Government here contends. Thus the Congress has affirmatively encouraged the parties to shorten their contest through normal procedures, consistent with established equity practice, without regard to the treble damage problem. When these considerations are coupled with the fact that Section 4 of the Sherman Act, under which this suit is brought, clearly incorporates the sensible time-saving rules traditionally employed by courts of equity,[1] it becomes clear that the Government's new-found and surprising theory of the law is so unsubstantial as not to deserve argument in this Court.[2]

Accordingly, even if the Court should conclude that jurisdiction to hear this appeal is not lacking, the order of the District Court below should be allowed to stand without further proceedings here.

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[1] See note 3, p. 13, *supra*.

[2] A number of the peripheral arguments presented by the Government are unrealistic in the context of this case. For example, the Government's argument that a declaratory judgment against Parke, Davis is necessary here in order to support Government damage suits (see Jurisdictional Statement, pp. 11-12) is wholly fallacious. None of the relatively insignificant transactions challenged in this case involved the Government in any way, and there has been and can be no suggestion that the Government has any kind of a damage claim against Parke, Davis.

CONCLUSION

For the foregoing reasons this Court should dismiss the instant appeal or, in the alternative, affirm the order of the court below.

Respectfully submitted,

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No. 526

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In its Motion to Dismiss or Affirm, appellee does not refute the showing made in the Jurisdictional Statement that the question presented is an important one in antitrust enforcement; and that the district court's refusal to adjudicate a violation, concededly shown by the record, solely because of its determination that injunctive relief is not required, would seriously weaken the effectiveness of the private treble-damage remedy. Rather, its primary argument is that this Court should dismiss the appeal because (1) the issue was neither urged by the Government in, nor decided by, the district court; and (2) the district court's findings, on which it based its denial of

injunctive relief, establish that this case is moot. Neither contention is valid.

1. Appellee argues (Motion to Dismiss or Affirm, 9–10) that "the parties concentrated exclusively upon the issue of injunctive relief throughout the [remanded] proceedings below," and it stresses (*id.*, 4) a statement in the Government's Supplemental Trial Memorandum that "the only issue now before the Court" is whether injunctive relief should be granted. That statement, however, is taken out of context, and we submit that the record shows that at no time during these proceedings did the Government ever abandon its prayer for relief in the complaint (Record, No. 20, Oct. Term, 1959, p. 7) that "the Court adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act." On the contrary, as we pointed out in the Jurisdictional Statement (pp. 6–7), the Government twice specifically stated in the court below that it was entitled not only to injunctive relief, but also to a judgment in its favor, *i.e.*, an adjudication of violation.

The complete statement in the Government's Supplemental Trial Memorandum was as follows (R. 17):

> Parke Davis, through its counsel, has indicated to the Court and the Government that it will defend on the sole ground of mootness. Therefore, the only issue now before the Court is whether Parke, Davis has clearly demonstrated that the abandonment of its policy was solely the result of economic conditions.

In other words, since appellee decided not to introduce any evidence directed to this Court's holding on the prior appeal that the Government's evidence established violation of the Sherman Act as charged, the only *contested* issue before the district court, we argued, was the need for injunctive relief. This statement by the Government *cannot* be construed as a waiver of the prayer in the complaint for an adjudication of violation—particularly since the point was subsequently specifically raised on two occasions in the district court, one of which as before the district court's initial ruling of July 5, 1960 (R. 3) that it would deny injunctive relief.[1] And, in view of the fact that appel-

[1] The Government's Reply Memorandum on Relief, filed about June 13, 1960, expressly urged that "judgment should be had against Parke, Davis and that the injunctive relief called for by the complaint be granted" (R. 34).

When the district court announced on July 5, 1960, that it "adhere[d] to its original decision and finds for the Defendant and against the United States, and denies injunctive relief" (R. 3), it further directed Parke Davis' counsel to submit proposed findings of fact and conclusions of law, and authorized Government counsel to then "bring any suggestions to the Court" (*ibid.*). On July 11, Parke, Davis submitted its proposed findings and conclusions (R. 84–89); it urged that the court find injunctive relief to be unnecessary and inappropriate, and that "[s]ince on the record as a whole the plaintiff is not entitled to the relief it seeks, the Complaint must be dismissed" (R. 89). Upon receipt of these proposals, the Government at once advised the court that it intended to submit objections, and did so early in the following week, including the request for an adjudication irrespective of denial of the injunction (R. 71–77, 95–96). Although the court had mailed its opinion to counsel the day before the Government filed its objections, the court considered them but found them unpersuasive. See text, *infra*, p. 4.

lee had indicated at the outset of the proceedings on remand that it would not challenge the holding of violation, it is hardly surprising, and certainly affords no basis for implying a waiver, that the Government did not further stress the point that it was entitled to an adjudication of such violation.

Nor can it fairly be said that the district court did not pass upon the issue. While the court did not deal with the question of adjudication in its findings and opinion, such relief was a part of the Government's prayer for relief. When the court denied relief, it necessarily denied all relief requested, including adjudication. Furthermore, the issue was specifically called to the court's attention in the Government's objections to appellee's proposed supplemental findings and conclusions (R. 71–77), which the district judge received the morning after he had mailed his opinion to counsel (R. 95–96). The district judge "carefully considered" those objections, but advised Government counsel that "they made absolutely no difference in his mind, and that he did not intend to change his Opinion as a result of them" (*ibid.*). Thus, whether the objections be considered as relating to the proposed judgment (the purpose for which the Government submitted them), or as a petition for rehearing or motion to amend the judgment (as the court apparently treated them), it is beyond dispute that the court "carefully considered" but rejected the Government's contention (R. 77; see R. 72) that "it is entitled to a judgment in its favor, whether or not injunctive relief is granted."

2. Appellee, relying on the dictum in *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633, that a "case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated,' " argues (Motion to Dismiss or Affirm, 12) that mootness is here established by the district court's finding (Fdg. 14, App. A, Jur. St., 24) that there is no "reasonable probability or likelihood" that appellee will resume its illegal practices. The short answer to this contention is that while such a finding "may" render a case moot, the district court did not here hold the case to be moot. For although appellee urged that the action should be dismissed (R. 89, 90)—the correct disposition if the case were in fact moot—the trial court declined to do so. Instead, it merely denied the Government's request for injunctive relief (and, necessarily, also its request for an adjudication of illegality, see *supra*, p. 4), and thus retained jurisdiction of the case. Plainly, the district court did not view this case as moot, despite its findings as to the unlikelihood of resumption of the illegal practices.

In thus refusing to dismiss the case as moot, the trial court applied the basic principle that a case is not moot unless the controversy between the parties has been completely settled. Here the controversy is far from settled, since the Government is still seeking, and appellee is resisting, an adjudication that appellee has violated the law, as sought in the complaint. The Government, as "trustee for the public under the [Sherman] act" (*United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 309), is seeking

such an adjudication both to aid the prosecution of private treble-damage suits by those who may have been injured by appellee's illegal actions, and also to facilitate its own proceedings. See Jurisdictional Statement, 8–13. Since there is thus a "truly adversary" relationship between the litigants, "the principal policy basis for the doctrine of mootness" (Mr. Chief Justice Warren, dissenting, in *Parker* v. *Ellis*, 362 U.S. 574, 592) is not applicable.

Both this Court and the lower courts have recognized that the need for an adjudication, which would serve as the basis for private damage litigation, dictates against a finding of mootness, even though the challenged practices had terminated. Thus, in *Southern Pac. R.R.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452, this Court adjudicated the validity of an Interstate Commerce Commission rate order that had already expired, on the ground that the adjudication of whether the railroad's rates were excessive would furnish the basis for determination of reparations suits by shippers. In *United States* v. *Hartford-Empire Co.*, 73 F. Supp. 979, 981 (D. Del.), the Government was permitted to bring a suit to declare invalid for fraud a patent which had already expired. The important public purpose which would be served, the court explained, would be to enable former licensees or infringers to recover the royalties or damages that had been collected by means of the unlawful patent monopoly. And in *United States* v. *Railway Employes' Dept.*, 286 Fed. 228, 232, 233 (N.D. Ill.), even though the conspiracy in restraint of trade had been completely abandoned by the time of judgment, an

injunction was allowed the Government for the purpose of enabling the victims of the conspiracy to recover under Sections 4 and 5 of the Clayton Act (15 U.S.C. 15, 16). See also *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 353 (Clayton Act case in which the Court rejected the Government's suggestion of mootness against a bill in equity, because of potential damage suit); *Burrell* v. *Martin*, 232 F. 2d 33, 38 (C.A.D.C.) (adjudication of invalidity of vacated order for employee's discharge, because of the "practical effect on appellant's right to collect back pay" in a subsequent Court of Claims action).

CONCLUSION

The basic objective of Section 5 of the Clayton Act—"to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors* v. *General Motors*, 340 U.S. 558, 568)—would be thwarted if, as appellee contends, an antitrust defendant can contest the alleged violation at trial but, if it loses, still avoid the consequences of an adjudication that the statute contemplates. See Jurisdictional Statement, 10–11. The issue is properly before the Court. The Motion to Dismiss or Affirm should be denied, and the Court

should note probable jurisdiction and decide the important question involving the public interest that this appeal presents.

Respectfully submitted.

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